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ALLEN *v.* COMMONWEALTH.

Jan. 24, 1918.

[94 S. E. 783.]

1. Larceny (§ 40 (6*))—Indictment and Proof—Variance.—Where an indictment for grand larceny properly described the check which was stolen, giving the amount, the date, the drawer and the drawee, and the bank upon which it was drawn, there was no variance by omission of the last figure in the number of the policy in payment of the loss on which the check was drawn.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 226.]

2. Indictment and Information (§ 130*)—Distinct Felonies—Separate Counts.—Distinct felonies may properly be charged in different counts.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 441.]

3. Larceny (§ 32 (1*))—Distinct Felonies—Separate Counts.—In indictment for grand larceny, it was not improper to charge ownership of the check involved in different persons in different counts.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 224.]

4. Indictment and Information (§ 132 (4*))—Distinct Felonies—Separate Counts—Bill of Particulars.—Where indictment for grand larceny charged larceny of a check or of the equivalent in money of the property of another person, requirement of bill of particulars stating whether accused would be tried for larceny at common law or for larceny of a check under Code 1904, § 3708, which places larceny of a check on the same basis as the larceny of money, was properly denied; the indictment charging the offense of grand larceny with sufficient particularity.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 442.]

5. Larceny (§ 48*)—Evidence—Admissibility.—In prosecution for larceny of check of insurance company in payment of loss on life policy, where accused claimed that he had paid the amount to the undertaker for burial expenses, the head of the claim department of the insurer was properly allowed to testify that the company had made no requirements as to payment of funeral expenses.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 229.]

6. Witnesses (§ 270 (1*))—Cross-Examining—Discretion of Court.—Cross-examination as to irrelevant collateral matters tending to show immoral character, affecting the credibility of the witness under cross-examination, should be left to the discretion of the court in the particular case.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 961.]

7. Witness (§ 266½*)—Cross-Examination—Effect.—A cross-examiner who asks a witness a question about immaterial collateral

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

matters tending to affect his credibility is bound by the witness' answer, and cannot contradict him.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 962.]

8. Witnesses (§ 72 (2)*)—Cross-Examination—Scope.—In prosecution for grand larceny, where defendant claimed he had paid the amount of the stolen check given in payment of a life policy to an undertaker to bury deceased, and the undertaker testified that accused had had him triple the bill, the undertaker could not be required to answer whether when his buggy had been damaged and the bill was \$6 he had had the wagon maker double the bill for the purpose of collecting double the damages.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 961.]

9. Witnesses (§ 270 (1)*)—Cross-Examining—Discretion of Court.—The test as to whether a matter is material or collateral in the matter of impeachment of a witness is whether or not the cross-examining party would be entitled to prove it in support of his case.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 961.]

10. Evidence (§ 354 (10)*)—Admissibility—Books of Account.—The admission of books of account, the entries having been made by the bookkeeper under the direction of some one familiar with the facts at or near the time of the transaction, in the usual course of business, is proper.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 775, 776.]

11. Indictment and Information (§ 132 (3)*)—Election between Counts.—In prosecution for grand larceny, where accused, an agent of an insurance company, procured change of beneficiary without the insured's knowledge, by misrepresenting the facts, and on her death collected the check for the amount of the policy by forging beneficiary's name, it was proper to refuse to require an election of the count of indictment on which conviction would be asked, where the indictment alleged larceny of the check belonging to the beneficiary, larceny of the equivalent in money belonging to the beneficiary, larceny of the check belonging to the insurance company, and larceny of the equivalent in money belonging to the insurance company.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 446.]

12. Larceny (§ 55*)—Evidence—Sufficiency.—Evidence held to sustain verdict of guilty of grand larceny by conversion of a check payable to another.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 230.]

13. Criminal Law (§ 829 (1)*)—Trial—Instructions—Duplication.—Where in 17 instructions given the court fully and fairly presented every question involved in prosecution for grand larceny, it properly refused instructions the tendency of which would only have been to confuse and mislead the jury.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 727, 742.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

14. Criminal Law (§ 1156 (4)*)—New Trial—Discretion of Court.—On motion for new trial on the ground that the jury impaneled had shown extreme prejudice against accused, the trial court has a discretion not reviewable in the absence of showing of injustice in view of Code 1904, § 3156, providing that no irregularity in drawing, summoning, returning, or impaneling jurors shall be sufficient to overturn the verdict unless the complaining party was injured.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 442, 463.]

Error to Hustings Court of Petersburg.

R. R. Allen was convicted of grand larceny, and he brings error. Affirmed.

L. O. Wendenburg, of Richmond, for plaintiff in error.

The Attorney General, for the Commonwealth.

G. OBER & SONS CO., Inc., v. WM. G. SMITH, Inc.

Jan. 24, 1918.

[94 S. E. 787.]

1. Appeal and Error (§ 266 (1)*)—Exceptions in Trial Court—Commissioner's Report.—Where no error is apparent on the face of the commissioner's reports, his conclusions and the decree of the court based thereon are conclusive upon appellant, who took no exceptions to reports in court below.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 565.]

2. Principal and Agent (§ 81 (2)*)—Commissions—Breach.—Where a principal was entitled to possession and control of notes received by his agent for fertilizer, because the agent had breached his contract, the withdrawal of the notes and undertaking to collect the same to the exclusion of the agent was not a breach.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 266.]

3. Principal and Agent (§ 83*)—Commissions—Breach.—Under contract entitling agent to bonus on sale of and settlement for 1,000 tons of fertilizer, he was not entitled to the bonus, although he had sold more than 1,000, where less than 1,000 had been collected for, and he breached his contract by failing to collect notes taken for remainder.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 266.]

Appeal from Circuit Court, Northampton County.

Action by G. Ober & Sons Company, Incorporated, against

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.